IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 71 OF 1997.

Mrs. Sebastian Sequeira,
r/o House No.1201,
Bodiem, Tivim,
Bardez, Goa. ... Appellant.

VERSUS

1. Mrs. Aurelia Norha Moss,
major, widow.

2. Mr. Stanislaus Shimon Moss,
major, both residing at
House No. 604, Tivim,
Bodiem, Bardez, Goa. ... Respondents.

Mr. A.F. Diniz, Advocate for the Appellant.

Respondents absent.

CORAM: N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 29.03.2004
DATE OF PRONOUNCING THE JUDGMENT: 6.04.2004

J U D G M E N T :

Special Civil Suit No. 67/91 giving rise to this appeal has been dismissed by Judgment and Order dated 13.3.1997 of the learned Civil Judge Senior Division, Bicholim.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. Briefly stated, it was the case of the

plaintiff that on 24.12.90 the defendants obtained a friendly loan of Rs.40,000/- from the plaintiff by executing a Demand Promissory Note before the Notary bearing No.2470 dated 25.12.90 agreeing to pay the loan after the names of the defendants are registered in respect of Survey No.204/14 of village Tivim.

4. The plaintiff stated that as per the conditions of the defendants, the names of the defendants were entered in Survey No.204/14. It was the case of the plaintiff that the defendants had informed the plaintiff that they had required the said money for some work and after their names were recorded in the said Survey number, they would mortgage the said property or sell the same and refund the loan of the plaintiff. The plaintiff stated her attorney Shri Izias D'Souza on several occasions approached the defendants and orally demanded from them the said loan taken by them but the defendants always gave one or another excuse and delayed the payment. The plaintiff stated that her attorney approached the defendants for the last time in the first week of June, 1991 and requested them to pay the loan amount and this time the defendants refused to pay any money to the plaintiff. The plaintiff stated that from the behaviour and attitude of the defendants the plaintiff had reason to

believe that the defendants wanted to evade the payment of the said money to the plaintiff.

5. On the other hand the case of the defendants was that they had not obtained any loan from the plaintiff and the said promissory note was without consideration. The defendants stated that they were foreign nationals and they had come from Israel for good and the plaintiff and her advocate told the defendants that they could not purchase a property without the permission of the Reserve Bank of India and that the defendants would be required to show the source from where the amount was brought and to overcome the said difficulty a way was suggested to the defendants to execute a promissory note as evidence. The defendants stated that they had sufficient amount with them and they did not require to obtain a loan and the plaintiff took advantage of the ignorance of the defendants in a given situation.

6. The defendants stated that the mutation of the property having Survey No.204/14 was changed on the strength of the sale deed dated 24.12.90. The defendants stated that they did not owe any money to the plaintiff.

7. The plaintiff in support of her case examined herself (P.W.1), her attorney and brother-in-law Eustaquio (P.W.2) and another far off relation by name Oliver (P.W.3). The defendants did not examine any witness. The defendants were duly served in this appeal, but have chosen to remain absent and it is understood that presently they have proceeded to Israel their native place.

8. Arguments have been heard by learned Advocate Shri A.F. Diniz. Shri Diniz has conceded that the so called demand promissory note (Exh.PW1/A) on which the suit of the plaintiff was based was not a demand promissory note and therefore no presumption under Section 118 of the Negotiable Instruments Act 1881 was available to the plaintiff. However, it is the contention of learned Advocate Shri Diniz that the said demand promissory note (Exh.PW.1/A) could have been considered as an agreement by the Trial Court and since the plaintiff had complied with her part of the agreement, the defendants were bound to pay Rs.40,000/- to the plaintiff as part of their agreement to be complied with. Shri Diniz has submitted that there was not much variance between the pleadings of the plaintiff and the evidence led by the plaintiff so as to enable the trial court to have dismissed the suit of

the plaintiff. It is the submission of learned Advocate Shri Diniz that the plaintiff had changed the survey records as stipulated in the said demand promissory note (Exh.PW1/A) and therefore was entitled to receive the said sum of Rs.40,000/- from the defendants.

9. Learned Advocate Shri Diniz has submitted that the case of the plaintiff was not such that the plaintiff deserved to be non-suited.

10. The learned trial Court has come to the conclusion that the said pro-note (Exh.PW1/A) was not a pro-note in the eyes of law because an instrument with a condition could not be considered as a promissory note. In coming to the said conclusion the learned trial court has placed reliance on Section 4 of the Negotiable Instruments Act, 1881. The learned trial Court also came to the conclusion that the evidence of the plaintiff was inconsistent with her pleadings and therefore proceeded to dismiss the suit of the plaintiff.

11. I have perused the evidence on record. It is well recognised principle that a party cannot be allowed to set up a case wholly inconsistent with the

case pleaded (See **Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas (dead) and others) A.I.R.** 1970 S.C. 2025). It is also a well recognised principle that the ordinary rule of law is that evidence can be given only on a plea properly raised and not in contradiction of the plea (See **Mrs. Om Prabha Jain v. Abnash Chand and another,** reported in A.I.R. 1968 S.C., 1083). In the case at hand the plaintiff gave evidence not only contrary to the case pleaded by her but there is also lot of confusion in the evidence given by the plaintiff. From the evidence led by the plaintiff it can be gathered that the plaintiff had sold to the defendants somewhere in the year 1990 as attorney of her relation Edith D'Souza, the said property surveyed under No.204/14 of Tivim village with a house in it for a sum of Rs.60,000/- and it was recorded in the said sale deed that the plaintiff had received the sum of Rs.60,000/-. If that is so, one fails to understand as to why the plaintiff took two promissory notes from the defendants, each of Rs.40,000/- and filed the present suit only on one pro-note and chose not to file a suit based on the other pro-note. The plaintiff has produced the pro-note at Exh.PW1/A which bears the date as 24.12.1990. The plaintiff however pleaded that the said pro-note was executed under No.2470 on 25.12.90

and in her evidence the plaintiff is confused as not to know whether the said pro-note was executed on 24.12.90 or 25.12.90 or for that matter 26.12.90. If the plaintiff had not received the consideration of Rs.60,000/- towards the said Sale Deed, the plaintiff has not explained as to why the she had obtained two pro-notes from the defendants of Rs.40,000/- each and the plaintiff has not explained as to why the consideration was mentioned as Rs.60,000/- in the said sale deed if in case she had sold the said property for Rs.80,000/-. Although the plaintiff filed the suit fo recovery of Rs.40,000/-, P.W.2 has stated that the suit is filed by him for Rs.80,000/-. The contention that the plaintiff is entitled to receive Rs.40,000/- under the said pro-note/agreement (Exh.PW1/A) because the plaintiff has changed the survey records does not appear to be true and, on the contrary, it is the defendants' assertion that the survey records were changed pursuant to the sale deed which appears to be true and if that is so, it appears that there was no consideration at all as otherwise mentioned in the said pro-note namely that the defendants would pay Rs.40,000/- to the plaintiff in case the names of the defendants were registered in the survey records under survey No.204/14. The plaintiff having come before the court with a story of the loan had to prove the same by

reliable evidence. The plaintiff has entirely changed her story in her evidence from the one pleaded by her and not only that, has given contradictory evidence which certainly could not be accepted. Even if the said demand promissory note – Exh.PW1/A is to be considered as an agreement simpliciter then also there does not appear to have been any consideration for the same. The defendants plea that the survey records were changed pursuant to the Sale Deed certainly appears to be more probable, once the sale deed is admitted, then the case pleaded by the plaintiff or sought to be proved by her.

12. In my view the suit of the plaintiff was rightly dismissed by the trial court and therefore the present appeal also deserves to follow suit.

N. A. BRITTO, J.

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